

**BEFORE THE INDIANA  
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of B.H.,	)	
And	)	
Franklin Community School Corp., and	)	<b>Article 7 Hearing No. 1243.01</b>
Johnson County Special Programs	)	
	)	
Appeal from a Decision by	)	
Kristen L. Anderson, J.D.	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

**Procedural History**

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the Parent or Parents of the Student. It should also be noted that Franklin Community School Corporation and Johnson County Special Programs will be referred to collectively as the “School.”

On September 26, 2001, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on September 27, 2001. A pre-hearing conference was conducted by telephone on October 8, 2001. The parties agreed to an extension of the forty-five (45) day decision deadline. On October 16, 2001, the IHO issued a pre-hearing order, which identified the issues to be determined at the hearing. The pre-hearing order also notified the parties that: a hearing would be conducted on November 27, 2001; the hearing shall be closed to the public; the parties shall exchange witness lists and a copy of each document they intend to offer into evidence on or before November 19, 2001, with a copy of those items to be provided to the IHO at the same time; the School shall make arrangements for the transcription of the hearing; and the deadline for the hearing decision was extended to December 12, 2001. The parties requested a continuance of the hearing scheduled for November 27, 2001. On November 30, 2001, the IHO issued an extension of decision deadline to January 31, 2002.

On January 31, 2002, the School requested an extension of the hearing deadline in order to hold a Case Conference Committee (CCC) meeting to discuss the results of the testing of the Student. On January 31, 2002, the IHO issued an extension of decision deadline to March 4, 2002. The CCC meeting was held on February 11, 2002. The School advised the IHO that the parties had reached an agreement but that the parent of the Student had not signed the Student’s Individualized Education

Program (IEP). On April 17, 2002, counsel for the Student requested that the matter be reset for hearing, took responsibility for delays in the hearing process, and requested an extension of the decision deadline. On April 18, 2002, the IHO issued a notice of pre-hearing conference and extension of decision deadline to June 24, 2002. A pre-hearing conference was conducted by telephone on April 24, 2002. On May 3, 2002, the IHO issued a pre-hearing order which notified the parties that a hearing would be conducted on June 5, 2002. The due process hearing was held on June 5 and June 6, 2002. The parties defined the issues for determination as follows:

1. The identification of all the child's handicapping conditions under Article Seven, i.e., whether the child is eligible for services on account of an Autism Spectrum Disorder.
2. The appropriate education program and related services for the child as they relate to an autism spectrum disorder, processing deficits in the area of written language, a behavior intervention plan and the child's access to the water fountain and restroom.

### **The Written Decision of the IHO**

The IHO's written decision was issued on June 24, 2002. The following case background information is reproduced verbatim from the IHO's written decision.

The child is a nine-year old boy who has just completed third grade. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at age five and has taken stimulant medication since that time. The same physician diagnosed the child as having Asperger's Syndrome, an autism spectrum disorder, in December 2000. The child has been taking Prozac to deal with certain symptoms of Asperger's Syndrome. The child continued to exhibit a number of disruptive and disrespectful behaviors, however.

At the time this due process hearing was requested, the parties could not reach an agreement whether the child qualified for services under Article Seven. Additional testing was performed during the pendency of this hearing. An independent diagnostic evaluation was performed in December 2001 and January 2002. The diagnostic team formed the opinion that the child's problems stemmed from his ADHD and an affective disorder.

The case conference committee met in February, 2002 and considered those findings but did not believe that the child had emotional problems that were interfering with his learning process and adversely affecting his educational performance. The parties did, however, agree that the child had an Other Health Impairment by virtue of his ADHD and a Communication Disorder by virtue of articulation difficulties and deficits in language pragmatics. The parties remained in disagreement whether the child qualified for services for an Autistic Spectrum Disorder.

The parents had another independent evaluation performed in February 2002. Their evaluator supported the parents' and physician's contention that the child had Asperger's Syndrome

although that evaluator agreed that the Asperger's Syndrome was co-morbid with the ADHD and could be co-morbid with an affective disorder. Respondents do not agree that the child has Asperger's Syndrome or is otherwise entitled to services for an Autism Spectrum Disorder. This hearing has proceeded for the purpose of determining whether the child meets the Article Seven criteria for an Autism Spectrum Disorder and the appropriate programming for his needs.

In April 2002 the parents gave permission to begin implementing the goals and objectives developed by the CCC in February 2002 for the child's Other Health Impairment, [which is] ADHD. Goals and objectives had also been formulated to deal with the child's articulation difficulties but the parents did not give permission for speech and language services because they did not want the child to be removed from his classroom for services.

The following information is gleaned from the eighteen (18) Findings of Fact determined by the IHO.

The Student has above-average intelligence (a "full scale" IQ of approximately 115) and receives grades in the "C" to "A" range in his academic subjects. The Student is frequently impulsive, impatient, inattentive and fidgety. These behaviors and mannerisms seem related to his ADHD and have some effect upon his interpersonal relationships. The developmental history of the Student strongly supports the existence of Asperger's Syndrome, which can be generally described as a learning disability in the area of social understanding. The Student generally interacts appropriately with adults in a "one-on-one" situation, but has not demonstrated the ability to form appropriate relationships with his peers. The Student frequently shocks his peers with blatant disrespect for his teacher and behaves in ways that annoy and "gross out" his peers in attempts to gain their attention. The Student does not appear to appreciate the need for social rules nor his need to conform to rules other than his own.

The School's progress report requires teachers to rate students on "social habits," "work habits," and "behavior." The Student's performance in these areas has shown a steady decline over the 2001-2002 school year. By the end of the last grading period of the 2001-2002 school year the Student was receiving an "F" in behavior and "needs improvement" in all other areas rated. Educational testing shows the Student to have significant deficits in the pragmatic use of language.

The CCC agreed that the Student was eligible for services as a Student with a Communication Disorder by virtue of articulation problems and weakness in the area of language pragmatics such as appropriately forming and answering questions. A speech and language therapist is an appropriate person to work with students who have deficits in language pragmatics as well as those who have articulation difficulties. The CCC formulated goals and objectives relating to the Student's articulation difficulties but none relating to the Student's deficits in language pragmatics.

The School proposed the following speech and language services for the Student: twenty (20) minutes per week individual and twenty (20) minutes per week small group. The School will begin instituting a

school-wide “Levels Plan” to deal with unacceptable behavior at the beginning of the 2002-2003 school year. This plan utilizes a series of written questions to lead students to understand their undesirable behavior.

The Student has an aversion to writing that may be a feature of Asperger’s Syndrome. The School is willing to consider the Student’s aversion to writing and has agreed that the Student can utilize the “Levels Plans” process orally. The Student is on medication that may make him thirsty from time to time. All students have regular access to restrooms and water fountains, and there is no policy preventing a teacher from granting additional access to these facilities as needed.

From these Findings of Fact, the IHO reached four (4) Conclusions of Law. For ease of reference, the Conclusions of Law are associated with the issues as stated by the IHO and agreed to by the parties.

**Issue #1: The identification of all the Student’s handicapping conditions Under Article Seven, i.e., whether the Student is eligible for services on account of an Autism Spectrum Disorder?**

In Conclusion of Law #1, the IHO found that while some factor or factors is/are evidencing an adverse affect on the Student’s educational performance, there is insufficient evidence to conclude that it is a disability in the area of verbal and nonverbal communication that is causing the adverse affect on the Student’s educational performance. The evidence is that the Student has been able to understand and communicate appropriately within the classroom. The Student does not meet the Article 7 criteria for an Autism Spectrum Disorder.

In Conclusion of Law #2, the IHO determined that the parties have agreed that the Student has an Other Health Impairment, which is ADHD, and have agreed upon appropriate goals, objectives, accommodations and modifications for his Other Health Impairment. The IHO found that the “Levels Plan” with a modification for oral processing is reasonably calculated to assist the Student in dealing with his argumentative, disrespectful, and disruptive behaviors and is appropriate to his needs as a Student with an Other Health Impairment.

**Issue #2: The appropriate education program and related services for the Student as they relate to an Autism Spectrum Disorder, processing deficits in the area of written language, a behavior intervention plan and the child’s access to the water fountain and restroom.**

In Conclusion of Law #3, the IHO determined that the parties have agreed that the Student meets the Article Seven criteria for a Communication Disorder by virtue of an articulation disorder. The IHO found that educational testing has shown significant communications impairments in the Student’s social usage of language pragmatics. The IHO determined that the Student is entitled to services to improve both his articulation difficulties and language pragmatics. The IHO also found that while the IEP

developed in February, 2002 proposed speech and language services reasonably calculated to benefit the Student with his articulation difficulties, it was not adequate to address the Student's deficits in the area of language pragmatics. The IHO further determined that the speech and language services offered by the School (two 20-minute sessions per week), with the addition of goals and objectives for language pragmatics, would be reasonably calculated to confer an educational benefit to the Student and are appropriate to meet his needs as a Student with a Communication Disorder.

In Conclusion of Law #4, the IHO determined that the School's practices and policies regarding access to restrooms and water fountains for non-handicapped students are appropriate to meet this Student's needs and do not interfere with his right to an appropriate education.

Based on the foregoing, the IHO issued two (2) Orders, which are reproduced below:

1. The case conference committee is ordered to reconvene and set goals and objectives for the [Student] relating to language pragmatics especially as they relate to the [Student's] deficits in the area of social understanding. These are to be in addition to the goals and objectives already established for the [Student's] articulation difficulties.
2. [The School is] to submit the goals and objectives relating to language pragmatics to the Division of Exceptional Learners for compliance and monitoring.

The IHO provided all parties with the appropriate notice of their right to seek administrative review.

### **Appeal To The Board Of Special Education Appeals**

On July 24, 2002, the Student timely requested an extension of time via facsimile transmission to file the Petition for Review, which was due by July 25, 2002. The BSEA, by order dated July 24, 2002, granted an extension of time to August 19, 2002, to file the Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including September 18, 2002. On July 24, 2002, the School filed, by facsimile transmission, its objection to the Student's request for extension of time to file the Petition for Review. On July 29, 2002, the BSEA made an entry regarding the School's objection to the Student's request for an extension of time within which to file a Petition for Review, which is reproduced, in part, below:

The School acknowledges in its objection that the IHO did not maintain jurisdiction, thereby making her decision of June 24, 2002, a final, appealable one. Petitioner's request for an extension of time is to preserve the right to prepare and file a Petition for Review, given that both parties agree that a CCC is scheduled for August 7, 2002, in accordance with one of the IHO's orders. If the issues are resolved at the CCC of August 7, 2002, there would be no need for any further administrative review. Had the parties waited until after the CCC meeting, it is unlikely any such Petition would be considered timely. The IHO's "Notice of Appeal

Rights and Procedures” advised the parties that any such Petition for Review would have to be filed within thirty (30) calendar days from the receipt of the written decision. The Motion by Petitioner was timely and contained articulated reasons for such a request. The BSEA has granted the Motion and sees no reason to disturb this order. As a consequence, the School’s objection is noted but is not persuasive. The Order Granting Extension of Time, entered the 24<sup>th</sup> day of July, 2002, remains undisturbed.

## **Petition for Review**

The Student filed on August 19, 2002, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA).

### Issue 1: The IHO wrongfully concluded that the Student did not qualify for Article Seven services under Autism Spectrum Disorder.

The Student argues that the IHO, after making many findings in support of Asperger’s Syndrome and ordering additional needs be met, wrongly concluded that the Student did not qualify for Article Seven services under Autism Spectrum Disorder. The Student objects to the IHO’s determination in Conclusion of Law #1 that “there is insufficient evidence to conclude that it is a disability in the area of verbal and nonverbal communication that is causing the adverse affect on the [Student’s] educational performance.” The Student argues that the IHO’s finding that there is insufficient evidence that the deficits are in the area of verbal and nonverbal communication is in contravention of the evidence, contrary to the law, and is arbitrary and capricious. The Student claims that the IHO’s finding that the Student did not qualify under Autism Spectrum Disorder, specifically Asperger’s Syndrome, was in contravention of the evidence, contrary to the law, and was arbitrary and capricious. The Student claims the evidence, specifically testing and observation, supported a finding of impairment based on verbal and nonverbal communication.

### Issue 2: The IHO failed to order the School to develop an appropriate Behavior Intervention Plan.

The Student claims that: the IHO failed to order the School to develop an appropriate behavior intervention plan; the “Levels Plan” is not a proper Behavior Intervention Plan (BIP). The Student objects to the IHO’s determination in Conclusion of Law #2 that “[t]he “Levels Plan” with a modification for oral processing is reasonably calculated to assist the [Student] in dealing with argumentative, disrespectful, and disruptive behaviors and is therefore appropriate to meet his needs as a [Student] with an Other Health Impairment.” The Student claims that the “Levels Plan” is vague and not positive because it calls for the use of authority, if inappropriate behavior is exhibited, is not “properly individualized,” and does not collect meaningful data. The Student argues that the IHO’s decision in support of the Levels Plan was not supported by the evidence, is contrary to the law, and is unreasonable and capricious.

Issue 3: The IHO failed to consider and address the evidence regarding the Student suffering from depression and a possible underlying mood disorder.

The Student claims that the IHO failed to consider and address the evidence regarding the Student's suffering from depression and a possible underlying mood disorder. The Student also claims that the IHO's failure to address this issue was contrary to the evidence and the law, and was arbitrary and capricious.

**The Response to the Petition for Review**

On August 23, 2002, the School timely requested an extension of time to prepare and file a Response to the Petition for Review. The BSEA, by an order dated August 26, 2002, granted an extension of time to September 12, 2002. The School also requested a copy of the transcript, which was provided to the School on August 26, 2002. A copy of the record was prepared and provided to each member of the BSEA on August 26, 2002. The School filed on September 12, 2002, its Response to the Petition for Review.

The School argued the Petition for Review failed to conform with the requirements of Article Seven because it did not identify "those portions of the findings, conclusions, and orders to which exceptions are taken." 511 IAC 7-30-4(d)(3). The School claims that the Student made no citations to the record in the Petition to Review to support a different conclusion. The School responded to each of the findings of fact, conclusions of law or orders referenced in the Petition for Review with the citations to the record supporting the IHO's decision.

The School claims that the Petition for Review presents the following three basic arguments: (1) The Student asserts that the IHO failed to determine the basis of the Student's eligibility for special education and related services as Autism Spectrum Disorder where he has been diagnosed with Asperger's Syndrome. (2) The Student claims that the IHO erred in finding the School's BIP to be appropriate for the Student's needs. (3) The Student argues that the IHO failed to address the Independent Educational Evaluator's conclusion that the Student may suffer from "episodic depression" and a "possible underlying mood disorder." The School claims that the Student cannot prevail on any of these three contentions.

Issue 1: Autism eligibility based on Asperger's Disorder diagnosis.

Finding of Fact 3

The School argues that the IHO properly determined the developmental history could support a diagnosis of Asperger's Disorder, which is generally described as a learning disability in the area of social learning. However, this does not lead one to conclude that the currently manifested behaviors are rooted in this diagnosis. *See* Finding of Facts #2 and #6.

#### Finding of Fact 4

The School represents that the IHO correctly determined that the Student generally interacted appropriately with adults in a one-on-one situation, although he has not demonstrated the ability to form appropriate relationships with his peers. These behaviors were summarized in the IHO's Findings of Fact 5 through 7.

#### Finding of Fact 5, 6, 7

The School represents that the IHO correctly summarized statements of the Student's inappropriate classroom behaviors with staff and peers, and are supported by the evidence in the record (Trans. pp. 425, 433, 438-439, 458-459). The School argues that the IHO's summary of the Student's inability to appreciate or conform his behavior to classroom rules and expectations is supported by the evidence (Trans. pp. 426, 431, 440). The School also argues that the IHO's summary of the Student's decline in behavioral performance over the 2001-2002 school year is supported by the evidence (Trans. pp. 416-417, 420, 150, 151-152, 161-162, 450-451). The School argues that the Student's behaviors are consistent with characteristics of ADHD under Article Seven's eligibility criteria for Other Health Impaired. 511 IAC 7-26-12(a).

#### Finding of Fact 8

The School represents that the IHO properly found that the Student has significant deficits in the pragmatic use of language when considered with his overall intellectual ability.

#### Conclusion of Law #1

The School represents that the IHO properly held that there is insufficient evidence to conclude that the Student's verbal and nonverbal communication deficits are causing an adverse affect on the Student's educational performance.

Issue 2: The IHO properly concluded the School's Behavior Intervention Plan is appropriate.

#### Finding of Fact 15

The School represents that the IHO's Finding of Fact 15 is supported by substantial evidence. The School argues that the Petition for Review fails to demonstrate that the IHO's findings of fact and conclusions of law relative to the Levels Plan are unsupported by substantial evidence, contrary to law, or arbitrary and capricious.

Issue 3: The IHO gave due weight to the evidence of episodic depression and possible mood disorder in rendering her decision.

The School represents that the IHO properly considered the Steck evaluation regarding the affective disorder. The School argues that there was no evidence that Asperger's Syndrome and an affective disorder were co-morbid conditions for the Student. The School claims that the only evidence suggesting that the Student has Asperger's Syndrome is a letter and Dr. Murphy's limited battery of tests. No other evaluator agreed with the diagnosis of Asperger's Syndrome for the Student. The School claims that the Student has failed to demonstrate that the weight attributed by the IHO to evidence of episodic depression and possible mood disorder was contrary to the evidence and the law or was arbitrary and capricious.

### **Review by the Indiana Board of Special Education Appeals**

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated September 6, 2002. Review was set for September 25, 2002, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on September 25, 2002. After review of the record as a whole and in consideration of the Petition for Review, the Response thereto, and the Parents' Response to the School's Response to the Petition for Review, the BSEA makes the following determinations.

#### COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Student timely appeals from the decision of the IHO. The School timely responds. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. Neither party asserts that the procedure employed by the IHO denied due process. Accordingly, the parties were provided their respective due process rights by the IHO in the conduct of this matter.
3. The BSEA accepts the IHO's Finding of Fact #3 as written.
4. The BSEA accepts the IHO's Finding of Fact #4 as written.
5. The BSEA accepts the IHO's Finding of Fact #5 as written.
6. The BSEA accepts the IHO's Finding of Fact #6 as written.
7. The BSEA accepts the IHO's Finding of Fact #7 as written.
8. The BSEA accepts the IHO's Finding of Fact #8 as written.
9. The BSEA accepts the IHO's Finding of Fact #15 as written.

10. The BSEA accepts the IHO's Finding of Fact #16 as written.
11. The BSEA accepts the IHO's Conclusion of Law #1 as written.
12. The BSEA accepts the IHO's Conclusion of Law #2 as written.
13. The BSEA accepts the IHO's Conclusion of Law #3 as written.
14. The BSEA accepts the IHO's Order #1 as written.
15. In regard to the Student's Issue 3, although the IHO did not specifically mention evidence on affective disorder as a Finding of Fact, she did address this issue on page 1, paragraphs 3 and 4 of her decision. Inasmuch as the CCC ordered appropriate services with which the IHO concurred, this issue becomes moot.
16. All other Findings of Fact, Conclusions of Law, and Orders are upheld as written.

### **ORDERS**

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The decision of the Independent Hearing Officer is hereby affirmed.
2. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: September 25, 2002 \_\_\_\_\_

/s/ Raymond W. Quist \_\_\_\_\_  
Raymond Quist, Chair  
Board of Special Education Appeals

### **APPEAL STATEMENT**

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. 4-21.5-5-5.

